IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 10, 2007 Session

KENNETH H. MARTIN v. MELLO MEDIA, LLC, et al.

Appeal from the Chancery Court for Davidson County
No. 06-227-I Claudia C. Bonnyman, Chancellor

No. M2007-00251-COA-R3-CV - Filed April 7, 2008

This appeal from summary judgment also addresses a counter-plaintiff's right to take a voluntary dismissal. Landowner filed a declaratory judgment action seeking to have a lease agreement with a billboard advertising company declared null and void; the company counterclaimed alleging breach of contract. Landowner moved for summary judgment as to his action and sought to dismiss the company's counterclaim. After determining that the declaratory action actually sought an advisory opinion, the chancery court declined to exercise jurisdiction and denied the landowner's motion for summary judgment.

In response, the company sought to voluntarily dismiss its breach of contract counterclaim without prejudice. Upon the landowner's renewed motion for summary judgment, the court determined that the motion for summary judgment regarding the counterclaim was still pending and denied the company a nonsuit based on Tenn. R. Civ. P. 41.01. The court then granted summary judgment in favor of the landowner and dismissed the counterclaim. The company appeals the trial court's denial of a nonsuit and the grant of summary judgment dismissing its counterclaim for breach of contract against landowner. Finding no error, we affirm the judgment of the chancery court in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed

J. STEVEN STAFFORD, SP.J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

Ralph W. Mello, Nashville, Tennessee, for the appellant, Mello Media, LLC.

Garrett E. Asher, Maryville, Tennessee, for the appellee, Kenneth H. Martin.

OPINION

I. BACKGROUND

This case has a rather convoluted procedural history which demonstrates the interplay of our rules of civil procedure. Kenneth M. Martin (hereinafter referred to as "Martin") is the owner of certain real property located along Interstate 24 at 420 Davidson Street, in Davidson County. Prior to 1972, a large billboard was erected on Martin's property for the purpose of outdoor advertising. The sign was erected before the General Assembly adopted the Billboard Regulation and Control Act of 1972. *See* Tenn. Code Ann. § 54-21-101, *et seq*. Martin leases the billboard space and collects rents in return; the income generated from the lease is the only income produced from the property.

For over 30 years, Martin leased the billboard space to Viacom.[1] Viacom owns the billboard structure itself; Martin has no rights in the actual billboard. The lease with Viacom was due to expire on October 31, 2005. Prior to the end of the Viacom lease, Martin met with Ralph W. Mello to discuss the possibility of leasing the billboard space to his company. Mr. Mello is the owner and chief manager of Mello Media, LLC, an outdoor advertising company located in Nashville, Tennessee (collectively referred to as "Mello"). During this meeting, Martin was informed that if he did not renew the lease with Viacom and instead contracted with Mello, Viacom would have to tear down its existing billboard in order for Mello to construct a new billboard in its place. Martin and Mello executed a lease agreement ("Agreement") for the billboard space commencing November 1, 2005.

Martin notified Viacom that its lease would not be renewed and requested the removal of its billboard structure. It was then that Martin learned of potential problems or restrictions concerning the construction of a new billboard on his property; Martin is not in the business of outdoor advertising.[2] Martin contacted the Tennessee Department of Transportation ("TDOT") and was informed that because of this particular sign's history, specifically, its construction before billboard control regulations were adopted, the sign would not be allowed to be reconstructed. He then retained an attorney to investigate the permit requirements for the sign's reconstruction. With no assurances from Mello and TDOT expressly stating it would not grant a permit to Mello for a new billboard, it appeared that Mello would not be able to build another sign on the property and Martin would forever lose the possibility of earning income from the lease of billboard space.

On January 27, 2006, Martin filed a complaint for declaratory judgment in the Chancery Court for Davidson County against Mello Media and Ralph Mello, individually. Martin sought to have the Agreement declared null and void based on the impossibility of performance and the failure

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[1]Viacom later became known as CBS Outdoor Advertising.

[2] Martin stated that when he informed Viacom that he would not be renewing the lease, he "learned that Tennessee has requirements that might preclude Mello from building a sign" which prompted him to investigate the matter further with the Tennessee Department of Transportation and inevitably led to the filing of a declaratory judgment action. Mello Media filed suit against Viacom for tortious interference with contract claiming it induced Martin to breach the contract with Mello Media. The Mello-Viacom lawsuit is not the subject of this appeal.

of consideration. Martin claimed Mello misrepresented material facts regarding its ability to obtain the proper permits and erect a billboard on his property.

Mello filed a motion to dismiss the declaratory judgment action claiming it improperly sought an advisory opinion and thus any judgment thereon would be improper. The court denied the motion; Mello then answered and asserted a counterclaim for breach of contract.

On August 1, 2006, Martin filed a motion for summary judgment. Martin asked the court to hold the Agreement null and void and also requested it dismiss Mello's counterclaim. The relevant portions of the motion read as follows:

> Plaintiff, Kenneth H. Martin, hereby moves for summary judgment in this declaratory judgment action. There are no genuine issues of material fact in this matter, and Mr. Martin is entitled to judgment in his favor as a matter of law. Accordingly, Mr. Martin respectfully requests that the Court grant Mr. Martin's Motion and hold that the Lease Agreement entered into with Mello Media, LLC is null and void. In addition, Mr. Martin respectfully requests that the Court dismiss the Counter-Claim asserted by [Mello] with prejudice.

In an order dated November 17, 2006, the court found that Martin "admitted in his filings with this court that he has repudiated the lease which he is now seeking to have this court declare null and void" and that "Mello Media, LLC has treated said repudiation as a breach of the lease[.]" The Chancellor denied Martin's motion for summary judgment, declining to exercise jurisdiction over the suit for declaratory relief because it determined the action improperly sought an advisory opinion. Mello also filed a motion for summary judgment on the issue of Martin's liability in the breach of contract counterclaim on November 17, 2006.

After the court dismissed the declaratory judgment action, Martin filed a renewed motion for summary judgment seeking a ruling regarding Mello's counterclaim on December 7, 2006. He claimed the court failed to consider the part of his motion seeking summary judgment on the breach of contract counterclaim. Four days later on December 11, 2006, Mello filed a notice of voluntary dismissal pursuant to Tenn. R. Civ. P. 41.01. A hearing was held on December 22, 2006 to address both summary judgment motions and Mello's motion for a nonsuit. The trial court found that it "did not address in its Order of November 17, 2006, any of the Counter-Claim issues that have been raised in [Martin's] Motion for Summary Judgment." Accordingly, the Chancellor held Mello was not entitled to an automatic dismissal without prejudice because Rule 41.01 of the Tennessee Rules of Civil Procedure precludes nonsuits when a motion for summary judgment is pending.

The court entered a final order January 3, 2007 in which it made a thorough statement of its findings of fact and the parties' respective positions and ordered Mello's counterclaim be dismissed pursuant to Martin's motion for summary judgment. The court focused on language from the Agreement which stated that "[Mello] shall have the right to make any necessary applications with, and obtain permits from governmental bodies for the contraction and maintenance of [Mello's]

outdoor advertising signs at the sole discretion of [Mello]. . . ." In addition, the court stated the dispute was over the correct application of law: Mello believed Tenn. Code Ann. § 54-21-116(b) allowed a new billboard to be permitted and erected within 18 months of the old billboard's removal whereas Martin believed Tenn. Code Ann. § 54-21-116(b) did not apply in this case because it only applied to billboards erected between 1972 and 1983.[3] The trial court held Mello failed to show that it met the conditions of the Agreement, that Martin failed to perform his obligations under the Agreement, or that Martin denied Mello the opportunity to apply for the new billboard permit.

On appeal, Mello challenges the trial court's denial of its request for a voluntary dismissal pursuant to Tenn. R. Civ. P. 41.01 and the grant of summary judgment to Martin on its counterclaim.

III. ANALYSIS

A. Voluntary Dismissal

Mello claims the trial court erred in denying it the opportunity to voluntarily dismiss its counterclaim insisting there was no pending motion for summary judgment that would prevent it from taking a nonsuit. A plaintiff has the right to take a voluntary nonsuit to dismiss an action without prejudice at any time before the trial of a cause, "*except when a motion for summary judgment made by an adverse party is pending*[.]" Tenn. R. Civ. P. 41.01(1) (emphasis added).

According to Mello, Martin's motion for summary judgment was denied by the November 17, 2006 order. The court, however, found that Rule 41.01 prevented Mello from an automatic dismissal because the court "did not address in its Order of November 17, 2006, any of the Counter-Claim issues that have been raised in [Martin's] Motion for Summary Judgment."

We review a court's determination on whether to allow a voluntary dismissal without prejudice while a motion for summary judgment is pending under an abuse of discretion standard. *Anderson v. Smith*, 521 S.W.2d 787, 790 (Tenn. 1975); *Stewart v. Univ. of Tennessee*, 519 S.W.2d 591, 592 (Tenn. 1974). A trial court's discretionary decision will be upheld as long as it is not clearly unreasonable, *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn. 2001), and reasonable minds can disagree about its correctness. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). Accordingly, a trial court has abused its discretion when it applied an incorrect legal standard, reached an illogical decision, based its decision on a clearly erroneous assessment of the evidence, or employed

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[3]The portions of Tenn. Code Ann. § 54-21-116(b) at issue read as follows:

> Permits issued prior to any change authorized hereby for outdoor advertising or for outdoor advertising subsequently erected pursuant to the permit, which meet size, lighting, spacing and zoning criteria shall be unaffected thereby. Whenever any existing outdoor advertising or outdoor advertising erected pursuant to permit issued as aforementioned is removed within the corporate limits of Memphis, Nashville, Knoxville or Chattanooga, the location thereof shall be subject to the issuance of a permit for a period of eighteen (18) months following the date of its removal. Thereafter, no further outdoor advertising development may occur.

reasoning that causes an injustice to the complaining party. *Id.*

At the December 22, 2006 hearing, Mello argued that Martin's motion asserted a motion for summary judgment as to the declaratory judgment action but only a motion to dismiss the counterclaim; he did not assert motions for summary judgment as to both the declaratory action and the counterclaim. We note that a trial court is not bound by the title of a pleading but has the discretion to treat it according to its substance. *See Norton v. Everhart*, 895 S.W.2d 317, 319 (Tenn. 1995). The trial court determined, within its sound discretion, that Martin's motion for summary judgment requested action on two matters: (1) summary judgment on the declaratory judgment action declaring the Agreement null and void; and (2) summary judgment on the breach of contract claim dismissing Mello's counterclaim. The court acknowledged that it failed to consider the counterclaim portion of the motion when it denied Martin's motion for summary judgment on November 17, 2006. Thus, that portion of the motion was still pending before the court.[4] We find no evidence suggesting the court abused its discretion by denying Mello's request for a nonsuit.

B. Summary Judgment

Because we have determined Mello was not entitled to a voluntary dismissal, we now address its claims of error regarding the court's dismissal of the counterclaim on summary judgment. Mello argues the trial court erred because it did not find Martin negated an essential element of Mello's claim or conclusively proved an affirmative defense but rather ruled it did not come forward with sufficient facts to establish its claim for breach of contract. This, according to Mello, was not his burden to prove.

The standard of review on summary judgment differs significantly from an abuse of discretion standard; summary judgment is purely a question of law which carries no presumption of correctness on appeal. *Lamar Tennessee, LLC v. City of Hendersonville*, 171 S.W.3d 831, 834 (Tenn. Ct. App. 2005) (quoting *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997)). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. "The phrase 'genuine issue' contained in Rule 56.03 refers to genuine factual issues and does not include issues involving legal conclusions to be drawn from the facts." *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993) (citing *Price v. Mercury Supply Co.*, 682 S.W.2d 924, 929 (Tenn. Ct. App. 1984)). When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. *Id.* at 215.

Mello contends it "had no burden at this stage of the proceedings to come forward with additional facts to show that the conditions of the Contract had been met, that [Martin] failed to

[4]We further find the filing of a renewed motion for summary judgment four days prior to Mello's notice of a nonsuit preserved the pending status of Martin's summary judgment motion.

perform a particular promise in the Contract, or that [Martin] denied Mello the opportunity to apply for the billboard permit" as stated in the final order. In response, Martin claims he negated the existence of a legal or enforceable contract, the first required element to establish a breach of contract claim, through the presentation of undisputed facts. *See ARC LifeMed, Inc. v. AMC-Tennessee, Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005) (quoting the essential elements for breach of contract claim as: (1) existence of enforceable contract; (2) nonperformance amounting to breach; and (3) damages resulting from breach).

In support of his motion, Martin provided his own affidavit, the affidavit of TDOT manager Rod Boehm, a copy of the Agreement, and a memorandum of law arguing a number of bases which voided the Agreement. Martin argued: (1) Mello made a material misrepresentation regarding its ability to construct a new billboard, or alternatively, that it was a mutual mistake; (2) Mello's inability to construct a new billboard resulted in the impossibility or impracticability of performance; and (3) Mello's inability to construct a billboard amounted to the failure of consideration supporting the Agreement. From the record before us, we find sufficient evidence to establish that Martin met his burden of proof, specifically that the Agreement was void due to impossibility of performance, and that the court properly granted summary judgment.[5]

Based on the Agreement and evidence before the court, it was undisputed that Mello was required to construct and maintain a billboard on Martin's premises and that the consideration for the Agreement was to be rent payments based on a contingency of the income received from advertisers.

The billboard on Martin's property is classified as a "grandfathered non-conforming device" which is defined by the Rules and Regulations for the Control of Outdoor Advertising as "one which was lawfully erected prior to the passage of the state law which is located in a legal area as defined by the law but which does not meet the size, lighting, or spacing criteria as set forth in the Agreement entered into between the Department of Transportation and the Federal Highway Administration which is part of the law."

TDOT representative Rod Boehm testified that, as part of his employment, he was responsible for "review[ing] applications for permits to maintain billboards that are required to be permitted by the State of Tennessee pursuant to Tennessee's Billboard and Regulation and Control Act, Tennessee Code Annotated § 54-21-101, *et seq*." According to TDOT, the billboard on Martin's property does not qualify for an exemption under Tenn. Code Ann. § 54-21-116(b) because it does "not meet the necessary spacing requirements at the passage of the 1972 legislation." Only outdoor devices erected between 1972 and 1983 qualify for the 18-month window exemption. Mr. Boehm stated that if the billboard on Martin's property was removed, then TDOT would consider it illegal to construct a new billboard in its place.

[5]Because we find sufficient evidence to establish the impossibility of performing the Agreement, we need not address the other theories advanced which would reach the same result.

It is undisputed that Mello never submitted an application for the necessary permit from TDOT to construct, erect, or operate a billboard on Martin's property. Since no application was submitted, Mello never received the necessary permit from TDOT allowing him to construct, erect, or operate a billboard on Matin's property. The court found that the right to apply for a permit was vested solely in Mello under the Agreement and that it had not applied for such a permit. Without passing on the propriety of TDOT's decision or drawing a legal conclusion therefrom, the fact, as presented, was that TDOT would not issue a permit for the construction of a new billboard on Martin's property. *See Byrd*, 847 S.W.2d at 211.

Instead, Mello argues that Mr. Boehm does not have the final authority on granting permits, insisting that no one has said Mello cannot rebuild the billboard, at least "nobody with any authority" has told him he cannot rebuild. Despite Mello's attack on Mr. Boehm's authority and credibility, the fact remains that Mr. Boehm is an agent representing TDOT and Mello chose only to depose Mr. Boehm in his capacity as a representative of TDOT. Moreover, Mr. Boehm's affidavit was left uncontradicted before the court and there is a presumption of honesty and integrity in those functioning as administrative decision makers. *See Gay v. City of Somerville*, 878 S.W.2d 124, 127 (Tenn. Ct. App. 1994) (citing *Cooper v. Williamson County Bd. of Educ.*, 803 S.W.2d 200, 203 (Tenn. 1990)). Additionally, the Chancellor found that "neither [party] has sought a declaratory order or a permit for the new billboard from the Tennessee Department of Transportation."[6] As Martin points out, Mello has not sought to challenge TDOT's interpretation of the billboard regulations through any legal or administrative action. As such, we find Mello did not offer sufficient evidence to dispute the impossibility of performance under the Agreement.

On appeal, Mello relies on the November 17th order which stated Martin "has repudiated the lease which he is now seeking to have this court declare null and void" and "Mello Media, LLC has treated said repudiation as a breach of the lease[.]" These findings, he argues, show there was no basis on which the court could have granted summary judgment in favor of Martin. We disagree. The above findings were simply statements reciting the parties' positions and procedural history of the action before the Chancellor declined to exercise jurisdiction over the matter. Clearly, the court revisited the parties' actions and proof one month later upon consideration of the parties' motions for summary judgment.

Having found no genuine issue of material fact as to the legality of the Agreement, we affirm the dismissal of Mello's breach of contract counterclaim pursuant to Martin's motion for summary judgment.

IV. CONCLUSION

[6]The court cited Tenn. Code Ann. § 4-5-225 which states that "[a] declaratory judgment shall not be rendered concerning the validity or applicability of a statute, rule or order [of an agency] unless the complainant has petitioned the agency for a declaratory order and the agency has refused to issue a declaratory order." Tenn. Code Ann. § 4-5-225(b).

Based on the foregoing, we find the chancery court did not abuse its discretion in denying Mello the right to a voluntary dismissal when a motion for summary judgment was pending. We also affirm the grant of summary judgment in favor of Martin and the dismissal of Mello's counterclaim for breach of contract. Costs of this appeal are taxed against Appellant Ralph W. Mello for which execution may issue if necessary.

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J. STEVEN STAFFORD, SPECIAL JUDGE